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In Re

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 78-201

JOHN B. GREENBOATZ, Individually, and as Chairman,
Nebraska Board of Parole; EUGENE H. NEAL, CATHERINE R.
DAHLQUIST, MARSHALL N. TATE, and EDWARD H. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX,
RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY,
ROBERT L. CAMRON, FREDERICK L. GRANT, WAYNE COHAM and
CHARLES LAPLANTE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR RESPONDENTS

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MEMORANDUM FOR RESPONDENTS

INTRODUCTION

For purposes of this memorandum, respondents accept and incorporate herein by this reference those portions of petitioners' Petition for a Writ of Certiorari entitled Jurisdiction, Questions Presented, Statutes Involved and Statement of the Case. Copies of the opinions below and pertinent statutes are contained in the appendices to the Petition.

ARGUMENT

I. The Questions Presented By Petitioners Should Be Resolved by This Court in Light of the Conflict of Decisions in the Circuit Courts.

The judgment of the Eighth Circuit in this action reversed certain portions of the district court's judgment. Those por-

tions reversed were favorable to respondents herein. Because of such reversals respondents would have asked this Court to consider the same questions presented by petitioners had not petitioners filed their petition seeking certiorari. Such questions encompass the concerns addressed by the six circuit courts which have reviewed the issue of whether due process applies to parole release proceedings. Petitioners correctly urge that there is clear conflict of decision among these circuit courts which can only be resolved through consideration of the constitutional question by this Court. The Eighth Circuit's decision (Appendix A in brief for petitioners), however, is not representative of a third split in the circuits as suggested by petitioners. Rather, its holding that due process applies to parole release proceedings is clearly in accord with the decisions of a majority of the circuit courts. Franklin v. Shields, 569 F.2d 784, 800 (4th Cir. 1978) (en banc); United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976); Childs v. United States Board of Parole, 511 F.2d 1270, 1280 (D.C. Cir. 1974); United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), vacated as moot, 419 U.S. 1015 (1974). Contra, Scott v. Kentucky Parole Bd., No. 74-1899 (6th Cir. Jan. 15, 1975) vacated and remanded to consider mootness, 429 U.S. 60 (1976) on remand Sub. nom. Bell v. Kentucky Parole Bd., 556 F.2d 805 (1977); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.) (en banc), vacated and remanded to consider mootness, 414 U.S. 809, dismissed as moot, 501 F.2d 992 (5th Cir. 1973). It does vary, however, from those prior decisions in that it is the first circuit court opinion to have considered the broad spectrum of rights which attach to an inmate seeking parole release rather than narrowly deciding the constitutionality of one or two aspects of the parole release proceeding and only hinting at the other considerations.

II. This Court's Prior Decisions Demand That Due Process Apply To Parole Release Proceedings.

This Court's own decision in Montayne v. Haymes is determinative on this issue. Where an inmate was transferred from one prison to another, the Court held that a due process procedure is not required before effecting the transfer ". . . absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." 427 U.S. 236 (1976) (Emphasis added).

Contrary to petitioner's assertion that a Nebraska inmate lacks a justifiable expectation that he will be released "in the absence of misconduct or other specified events" (Brief for petitioners at 10), Neb. Rev. Stat. § 83-1,114 specifically orders, as recognized by the Eighth Circuit, the release of an inmate unless certain listed factors are present which cause the board members to form the opinion that his parole should be deferred. This seems to be exactly the sort of "right or justifiable expectation rooted in state law" which this Court noted as requiring the protection of due process in Wolff v. McDonnell, 418 U.S. 539 at 558 (1974).

We must in this regard take exception to the petitioners' argument that since some of the criteria listed in Neb. Rev. Stat. § 83-1,114 are subjective in nature and not susceptible to proof, an evidentiary hearing would serve no purpose. Precisely because some of these criteria are not susceptible to proof or even factual definition, due process protection is required to insure that the decisions reached by the board are not arbitrary and abusive. Moreover, as some of the criteria statutorily required for consideration are objective and thus more readily provable, the inmate eligible for parole should be allowed to present his proof of compliance with these criteria, i.e., his plans for employment and residence upon release, his availing of the various self-help facilities for rehabilitation.

III. As the Circuit Courts have Varied Widely in the Amount and Type of Due Process They Have Found to be Demanded in Parole Release Proceedings, the Issue is Ripe for Resolution by this Court.

While the varying opinions of the circuit courts holding that due process applies to parole release proceedings may be explained on the basis of each having presented only specific issues, rather than the general question of what elements of due process are applicable, sufficient confusion between such opinions exists to justify final resolution by this Court. This action presents the ideal case for consideration of this important issue inasmuch as it requests a determination of what elements are due rather than a question of whether a specified element or elements are due. Further, because of its status as a class action, it is not likely to become moot, as have previous cases presenting these issues to this Court.

Respondents note that portion of the Eighth Circuit's opinion stating:

In any event, we hold that to comply with the due process clause the Board has to provide a formal parole hearing only when the inmate first becomes eligible for parole. (Brief of petitioners at App. 17).

Respondents take specific exception to such holding and state their intention to argue that an annual hearing is required. This is particularly true in view of the provisions of Neb. Rev. Stat. § 83-1,111(4) which states:

If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

This statute was apparently overlooked by the Eighth Circuit in its opinion. However, independently of the statutory provisions, respondents strongly assert that due process in any event requires at least an annual hearing for eligible inmates. Such position is bolstered by the provisions of Neb. Rev. Stat.

§ 83-1,111(4) which provides a "right or justifiable expectation rooted in state law", Montayne v. Haymes, supra, and Wolff v. McDonnell, supra. Respondents believe that this issue and that of whether inmates eligible for parole are entitled to present other than documentary evidence at a parole hearing are issues fairly comprised within the questions presented for review by the petitioners.

IV. The Present Procedures of the Nebraska Parole Board do not Comply with the Due Process Clause.

Because petitioners have devoted a portion of their petition to an assertion that the present procedures of the Nebraska Parole Board comply with the due process clause, it is necessary to respond thereto in a brief fashion. It is sufficient in this respect to note, as both the district and circuit court did, some of the ways in which the present procedures are deficient: (1) adequate notice of parole hearings is not given; (2) the criteria utilized by the Board of Parole are not disclosed to the inmates; (3) inmates are not permitted to hear, nor are they advised of the content of, adverse testimony; (4) inmates are not always advised of the reasons for denial of parole; and (5) inmates are never advised of the evidence relied upon in denying parole. Determination of the questions of the applicability and the scope of due process requirements, require determination of the question of compliance.

CONCLUSION

For the foregoing reasons, respondents concur with petitioners in respectfully submitting that the petition for a writ of certiorari should be granted.

Brian K. Ridgeway
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned, counsel of record for respondents, certifies that a copy of the foregoing Memorandum For Respondents was served upon Ralph H. Gillan, attorney of record for petitioners by mailing said copy to him at 2115 State Capitol, Lincoln, Nebraska, on the 1st day of September, 1978.

Brian K. Ridgeway
Attorney for Respondents